In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-832

AHTO WALTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was brought by the United States to recover on a promissory note, signed by Ahto Walter and his wife, Lucy Walter, and on a guarantee agreement, executed by their son, Ewen Duff Walter, and to foreclose on a First Preferred Ship Mortgage on the note's collateral, the fishing vessel MARY ANN. The note, mortgage and guarantee agreement were executed on December 15, 1966, evidencing a loan of $397,506.00,[1] advanced to petitioners to build the MARY ANN, by the United States Bureau of Com-

[1] The loan, including interest payable at a rate of six (6) percent per annum, had a maturity date of ten (10) years. Complaint, Exhibit A.

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mercial Fisheries, pursuant to the Fish and Wildlife Act, 16 U.S.C. 742a, *et seq.*

On April 5, 1967, when the partially-built ship was being moved to a new location to complete construction, she capsized, resulting in approximately $77,000.00 in damages. At the time of the accident, there was in force, as required by the mortgage,[2] a builder's risk insurance policy. The policy provided that all losses were to be payable to the United States as mortgagee; it also contained a standard mortgage clause endorsement that the interest of the United States, as mortgagee, would not be impaired or invalidated by any act or neglect of Ahto Walter, or by his failure to comply with any warranty or condition over which the United States had, but had not yet exercised, control (Pet. App. 5a). Under a second builder's risk policy on the ship obtained by the shipyard, Ahto Walter was named as the loss payee.

After the accident, Ahto Walter had the damage to the ship repaired at his own expense and subsequently filed claims under both policies. These claims were denied by the insurance companies, primarily because the MARY ANN was not at a building location or on a trial run when the damage occurred. Walter then brought suit under the shipyard policy, for which he was the loss payee; he requested that the United States sue under the separate policy affording it coverage, claiming that whatever defenses might be

[2] Article I, section 2 of the mortgage provided that the "Mortgagor will, at all times and at his own expense, keep the Vessel insured" with coverage "fully and adequately protecting the Vessel and the Mortgagee's interest therein" (Pet. App. 5a).

asserted against him could not prevail against the United States because of the mortgage clause endorsement in its favor. The United States declined to sue.[3]

Installments due on the note payable to the United States went unpaid, and, on November 1, 1968, the United States declared the note and mortgage to be in default. It then intervened in the litigation involving the insurance companies, and also brought a separate suit on the note, guaranty and mortgage against the ship MARY ANN *in rem* and against the Walters *in personam*. Ahto Walter filed a counterclaim against the United States, alleging that his inability to meet his mortgage obligations was caused by the refusal of the United States to sue the underwriters of the policy affording it coverage.[4] This refusal, he asserted, constituted a breach of contract.

On cross-motions for summary judgment, the district court held that there had been no breach of contract by the United States, and entered judgment in favor of the United States in the full amount of $209,527.14, plus interest and costs (Pet. App. 4a–15a). The court of appeals affirmed (Pet. App. 16a–19a).

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[3] Walter was given permission to sue in the name of the United States, if he so desired, under the basic provisions of the policy affording it coverage. Walter chose not to exercise that authority, but instead amended his complaint in his previously-filed suit to allege a cause of action on his own behalf against the company holding the policy for which the United States was the loss payee.

[4] Walter claimed that the proceeds recovered from such a suit could have been applied to reduce his mortgaged indebtedness or could have been paid to him directly as reimbursement for his expenditures in repairing the MARY ANN.

1. Petitioners argue that the refusal of the United States to sue its insurers conflicts with the underlying policy of the loan provisions of the Fish and Wildlife Act, 16 U.S.C. 742c. Their point is not well taken.

The statutory loan provisions were enacted because long-term loans at reasonable interest rates were generally unavailable from commercial lenders due to the hazardous nature of the industry. See, *e.g.*, H. Rep. No. 2519, 84th Cong., 2d Sess., 1956 U.S. Code Cong. Admin. News, pp. 4590–4591; H. Rep. No. 600, 89th Cong., 1st Sess., 1965 U.S. Code Cong. Admin. News, p. 2324. To assist in the maintenance and development of the commercial fishing industry, Congress in the Fish and Wildlife Act authorized low-interest, long-term loans by the United States "where repayment of the loan will be reasonably assured" (16 U.S.C. 742c(b)(4)).[5] In the event of a default, the Secretary of the Interior is authorized to foreclose on the collateral, manage and dispose of it "upon such terms and conditions as he may deem most advantageous to the United States." 16 U.S.C. 742k. See S. Rep. No. 826, 87th Cong., 1st Sess., 1961 U.S. Code Cong. Admin. News, pp. 2638–2639. Nothing in the Act even remotely suggests, as petitioners seem to intimate, that Congress

[5] As originally enacted in 1956, the statute provided for ten-year loans at rates of interest not less than 3 percent per annum. In 1965, the Act was amended to provide loans for constructing new vessels of up to fourteen years, with interest in all cases at a rate "not less than (a) a rate determined by the Secretary of the Treasury, taking into consideration the average market yield on outstanding obligations of comparable maturity, plus (b) such additional charge, if any, toward covering other costs of the program as the Secretary may determine to be consistent with its purpose." Pub. L. 89–85, §§ 2, 3, 79 Stat. 262.

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intended the Secretary to forgive outstanding loans from time to time if enforcing payment would cause some financial hardship. Nor does the statute contemplate that the United States is, by virtue of its loan, also to act as a guarantor of the success of any individual fishing venture. And, as the court below pointed out (Pet. App. 18a), the Act imposes no obligation on the United States to commence an action against its insurer at the request of one who has benefitted from the statutory loan provisions.

2. Nor was any such obligation imposed by contract. As both courts below correctly held, the mortgagor (Ahto Walter) has no rights under the mortgagee's (United States) coverage, and he cannot acquire any rights thereunder by assignment, subrogation or as a third-party beneficiary. The mortgage clause endorsement is a separate and independent agreement between the insurer and the mortgagee, to protect the latter in the event of wrongdoing on the part of the mortgagor. See 5A Appleman, *Insurance Law and Practice*, § 3405, pp. 311–321 (1970); 18 Couch on *Insurance* 2d, § 74:344, p. 436 (Anderson ed., 1968). It gives the mortgagor no separate remedy against the insurer by forcing the mortgagee to bring suit to assert its rights thereunder. See *Levine* v. *Insurance Company of North America*, 440 F. 2d 679 (C.A. 5).

3. We add only that in this case the United States had no interest in collecting on its policy at the time Walter requested it to sue. The collateral in which it held a security interest, the MARY ANN, had by then been fully restored, and Walter, the obligor and mortgagor, was at that time still in good standing, *i.e.*, he

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had not yet been declared in default. Walter, on the other hand, had a substantial interest in recovering under the basic builder's risk provision of the policy in which he was the named assured and the United States was the loss payee. To assist him in this recovery, the United States authorized Walter to sue in the name of the United States. Instead, he chose to sue under the basic builder's risk provision in his own name. He is therefore in no position to complain because the United States declined to commence a separate action on its own that might have inured to his benefit.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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